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DONALD L. CLARK, County Counsel,
County of San Diego
LLOYD M. HARMON, JR., Chief Deputy
By JACK LIMBER, Deputy

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236-3651

Attorneys for Defendants and Respondents

In The Superior Court of the State of California
IN AND FOR THE COUNTY OF SAN DIEGO

No.

BOARD OF SUPERVISORS OF THE COUNTY OF SAN DIEGO, Plaintiff and Petitioner, v. GERALD J. LONERGAN, Auditor & Controller of the County of San Diego, and JAMES E. JONES, Treasurer-Tax Collector of the County of San Diego, Defendants and Respondents.	APPLICATION AND MOTION FOR PROTECTIVE ORDER

Defendants and respondents Gerald J. Lonergan, Auditor & Controller of the County of San Diego, and James E. Jones, Treasurer-Tax Collector of the County of San Diego, apply to the court and move the court for an order, in substantially the form set forth below, as determined by the court, to permit them to proceed with their legal duties of computing and collecting taxes on the unsecured tax roll for the taxing agencies whose taxes on said roll are computed and

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collected by them:

FORM OF ORDER

IT IS ORDERED that defendants and respondents Gerald J. Lonergan, Auditor & Controller of the County of San Diego, and James E. Jones, Treasurer-Tax Collector of the County of San Diego, compute and collect taxes on all property on the 1978-79 unsecured roll in San Diego County by applying thereto the secured property tax rate established for 1977-78, in the manner prescribed by Article XIII, Section 12, of the California Constitution and Revenue and Taxation Code, Section 2905.

IT IS FURTHER ORDERED that said defendants and respondents impound that amount of taxes collected which exceeds the amount which would have been collected if the taxes on the unsecured roll had been collected at a rate of 1% of the full cash value of the property. Such impound shall be made in the same manner as taxes would be impounded under Government Code Section 26906.1, until the final disposition of this proceeding. If, under such final disposition, it is determined that such revenues were properly collected, such impounded revenues shall be released to the County or revenue district entitled thereto and if the final disposition determines that the amounts impounded were not properly collected, such revenues shall be refunded to the

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person paying the tax, without the necessity of a claim being filed.

This motion is made upon this application and motion, the points and authorites attached hereto, and the declarations of the defendants and respondents herein, filed herewith.

DATED: August 9, 1978

DONALD L. CLARK, County Counsel

By

JACK LIMBER, Deputy
Attorneys for Defendants and Respondents Gerald J. Lonergan, Auditor & Controller of the County of San Diego, and James E. Jones, Treasurer-Tax Collector of the County of San Diego.

POINTS AND AUTHORITIES

Plaintiff and petitioner seeks from the Court a peremptory writ of mandate commanding defendants and respondents to immediately comply with Article XIII, Section 2 and Article XIIIA, Section 1, of the Constitution of the State of California and Section 2237(b) of the California Revenue and Taxation Code by using for the unsecured roll for 1978-79 the 1% tax rate on secured roll for 1978-79; and by preparing or revising the 1978 unsecured property tax bills heretofore prepared to reflect such property tax rate which is required by said provisions of law.

This command sought at this time can have no other purpose than to compel the defendants and respondents to revise the tax bills for property on the unsecured roll, whether or not the bills have been mailed, and to collect as taxes on the 1978-79 unsecured roll only amount which will be equal to the yet undetermined 1978-79 secured property tax rates.

An orderly process has been established by the Constitution and the laws of the State of California for payment of any disputed tax with the payor first paying the tax then filing a claim for a refund. This permits an orderly resolution of any legal issues respecting the collection of any tax. (Cal. Const. Art. XIII § 32; Rev. & Tax. Code §§ 4807, 5096 et seq. and 5140 et seq.) Plaintiff and petitioner seeks to short circuit these provisions and provide immediate relief

to the taxpayers it claims are benefited. Plaintiff and petitioner names as parties to this proceeding only the officers having the ministerial duty to apply the law--the Auditor & Controller and the Treasurer-Tax Collector of the county. It does not name the beneficiaries of the tax, i.e., the public agencies who will receive the funds collected or the recipients of their services. Any act by the defendants and respondents to follow the advice of plaintiff and petitioner may well be at their peril should the court determine not to adopt the legal construction of Proposition 13 advanced by plaintiff and petitioner.

Defendants and respondents, as ministerial officers, are able to accede to plaintiff and petitioner's construction of the law only if they are given adequate direction to implement it and protection should plaintiff and petitioner's construction not be ultimately upheld by the court.

Defendants and respondents have not yet computed and mailed the bulk of the unsecured tax bills, although they were about ready to be computed and mailed when the suit was brought.

Defendants and respondents' duty is to compute and collect the taxes on the unsecured roll for the benefit of not only the County of San Diego, but also the various cities in the County of San Diego, the school districts in San Diego County, the special districts in San Diego County, and some multi-county districts having taxing power in San

Diego County. None of these recipients of the unsecured property taxes is a party to this law suit.

Article XIII, Section 12, of the California Constitution provides:

> "(a) Except as provided in subdivision (b), taxes on personal property, possessory interests in land, and taxable improvements located on land exempt from taxation which are not a lien upon land sufficient in value to secure their payment shall be levied at the rates for the preceding tax year upon property of the same kind where the taxes were a lien upon land sufficient in value to secure their payment.
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> "(b) In any year in which the assessment ratio is changed, the Legislature shall adjust the rate described in subdivision (a) to maintain equality between property on the secured and unsecured rolls."

Revenue and Taxation Code, Section 2905 provides:

> "In collecting taxes on unsecured property the tax rate to be used is the rate for property of the same kind on the secured roll last fixed before the lien date for the taxes to be collected. In collecting taxes on unsecured property that escaped taxation in any prior year or years the rate to be used shall be the rate to which the property would have been subject if it appeared upon the roll in the year when it should have been lawfully assessed. The taxes on unsecured property shall be computed in dollars and cents, rejecting the fractions of a cent."

The plain language of Constitution Article XIII, Section 12 and Revenue and Taxation Code, Section 2905, imposes upon defendants and respondents the duty to compute and collect unsecured taxes at the rate established as the secured rate for the prior year. Neither the express language of Proposition 13 (Article XIII-A) nor any language of the statutes implementing Proposition 13 modify this. Until such time as defendants and respondents' ministerial duty is

judicially defined, they act at their jeopardy if they collect less than the amount specifically required by Article XIII, Section 12, and Revenue and Taxation Code, Section 2905.

Defendants and respondents are aware of the policy decision of the Board of Supervisors to compute and collect taxes on the unsecured roll at that amount which the Attorney General through his opinion and the State Board of Equalization and the State Controller have advised is the amount to collect under Proposition 13. However, if defendants and respondents perform in accordance with these directions, they are unprotected should a court later determine that the provisions of Article XIII, Section 12, and Revenue and Taxation Code, Section 2905, are still viable and they have not collected the unsecured property tax required by these provisions. (See Gov. Code §§ 815.6 and 1222; Ellis v. City Council [1963] 222 Cal.App.2d 490, 497.)

Accordingly, defendants and respondents seek from court a protective order which will promptly undertake to guide them in proceeding with their ministerial duties. It will be costly to revise the tax bills in accordance with the directions sought from the court and it will be costlier still if the position sought by plaintiff and petitioner is not ultimately upheld by the court.

If defendants and respondents proceed to compute and send out tax bills and collect unsecured taxes on the basis

of the Attorney General's opinion, they are not only unprotected should the plaintiff and petitioner not ultimately prevail, they are unprotected from other actions should other parties seek to compel them to proceed in any other matter. Likewise, if defendants and respondents proceed to compute and send out the tax bills and collect on the basis of Article XIII, Section 12, and Revenue and Taxation Code, Section 2905, as they initially proposed to do, they are unprotected from other suits, as well as this suit, pending its outcome.

For these reasons some order from the court is necessary to guide these officers in the performance of their ministerial duty.

The tax bills in San Diego County should have gone out before July 31, 1978, and in orderly process would become delinquent on August 31, 1978. (Rev. & Tax. Code § 2922.) The bulk of the tax bills have not gone out, and each delay in computing and issuing the bills further delays the collection process. The assessments have been placed on the roll as of August 21. Assessments placed on the roll in any month after July do not become delinquent until the end of the month following the month they are placed on the roll. (Rev. & Tax. Code § 2922.) Upon delinquency, a 6% penalty attaches and an additional penalty of 1% each month thereafter. (Rev. & Tax. Code, § 2922.) The assessments now to be processed will be delinquent by operation of law on September 30.

To delay the ministerial functions of computing and billing will work an undue hardship on taxpayers who may not receive their bills until very near or even after the delinquency date. The court must act promptly to permit the bills to be issued to avoid that hardship. The public agencies are deprived of all of the tax on the unsecured roll pending some resolution of this matter. Unsecured property taxes, by their very nature, are frequently difficult to collect because of the transient nature of some of the owners of such property and because of the business exigencies relating to particular taxpayers. For that reason the Legislature has provided for almost immediate collection of unsecured taxes at the beginning of any taxing year, while leaving the secured property taxes protected by a lien to a more leisurely collection process.

Defendants and respondents need immediate judicial relief to protect them from claims and suits of recipients or beneficiaries of the taxes on the unsecured roll.

Inasmuch as the recipients of the revenues derived from property on the unsecured roll are not parties to this proceeding, those recipients will not be bound by any interim proceedings until such time as the issues are ultimately resolved by appropriate courts having jurisdiction. For that reason if the statutes requiring the computing and billing of unsecured taxes are to have any effect, immediate court orders should make clear, in the same manner that

preliminary injunctive relief would make clear, the duties and responsibilities of the parties.

This order should not have to be sought by defendants and respondents. If plaintiff and petitioner is serious about its conclusion, it should be seeking such immediate relief, not delay, rather than having the defendants and respondents, who are the ones who will be damaged by compliance, seeking the umbrella of the court to protect them from the fallout brought about by the filing of this suit. These defendants and respondents are but ministerial officers--they have no policy decisions to make or enforce in the performance of these duties--and they are entitled to the protection of the court to assure that they can orderly perform the duties imposed upon them by the Constitution and the statutes. They want to proceed with the business of computing and collecting taxes in the manner required by law.

CONCLUSION

Defendants and respondents Gerald J. Lonergan, Auditor and Controller of the County of San Diego, and James E. Jones, Treasurer-Tax Collector of the County of San Diego, request that the Court issue its order, in the form set forth in the application and motion on file herein, ordering defendants and respondents to compute and collect taxes on the 1978-79 unsecured roll in the manner prescribed in

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Article XIII, Section 12, and Revenue and Taxation Code, Section 2905, and impound any excess over the amounts plaintiff and petitioner claims should be collected.

DATED: [illegible], 1978

DONALD L. CLARK, County Counsel

By [signature]
JACK LIMBER, Deputy
Attorneys for Defendants and Respondents Gerald J. Lonergan, Auditor & Controller of the County of San Diego, and James E. Jones, Treasurer-Tax Collector of the County of San Diego.

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